Filed 6/14/07 P. v. Perkins CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALEXANDER RUSSELL PERKINS,<br><br>Defendant and Appellant. | B187604<br><br>(Los Angeles County<br>Super. Ct. No. GA056670) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Alexander Russell Perkins appeals from judgment entered following his no contest plea to four counts of second degree burglary (Pen. Code, § 459) and his admission that he suffered a prior conviction and served a prison term within the meaning of Penal Code section 667.5, subdivision (b). His request for a certificate of probable cause was granted. He was sentenced to prison in count 1 to the low term of 16 months and received concurrent terms of 16 months on the remaining three counts. The one-year term for the prior prison term allegation was stricken. He contends the trial court erred in refusing to permit him to withdraw his plea. For reasons explained in the opinion, we affirm the judgment.

## FACTUAL AND PROCEDURAL SUMMARY[1]

The pre-plea probation report reflects that on July 24, 2003, Ed Clark, general manager of Webster's Pharmacy in Pasadena received a phone call from a person who identified himself as Russell Alexander. Mr. Alexander claimed to be an attorney with the Los Angeles County District Attorney's Office and stated his wife tried to return some medical supplies at the pharmacy and was declined because she did not have a receipt. Mr. Alexander stated he would send his son to make the return. Later that day, appellant walked into the pharmacy and stated he was the son of Russell Alexander. He was given a refund of $209.65 for a box of glucose test strips. Mr. Clark later discovered the store had not carried the brand of test strips returned by appellant since February 2003 and tried to call Russell Alexander. An investigator with the district attorney's office learned the telephone number belonged to appellant. An examination of phone records led to victim, "Sephora," a cosmetic store and victim "Drug Emporium."

---

[1] Defense counsel stipulated to a factual basis based upon the police reports and pre-plea probation report.

On August 7, 2003, employee Dennis Griffin received a call at Sephora from a Russell Alexander. Mr. Alexander stated he is an attorney and his wife was called a "bitch" by a Sephora employee. Later that day, appellant walked into Sephora, identified himself as attorney Russell Alexander and stated he wanted to return some expensive face cream purchased by cash at the Sephora store in Pasadena. Appellant claimed his wife had an allergic reaction to the cream and he was given a $150 cash refund by a Sephora employee. A cash purchase record check of Sephora in Pasadena revealed no cash purchase of the particular face cream between January 1, 2003 and August 7, 2003.

On September 11, 2003, employee Byron Grays received a phone call from a Russell Alexander at the Drug Emporium store in Redondo Beach.
Mr. Alexander claimed his wife tried to return some store merchandise and was called a "bitch" by a store employee. Mr. Alexander threatened to sue the store unless the store accepted the returns. Appellant walked into the store and attempted to return a digital ovulation testing kit. Mr. Grays informed appellant the store did not carry the testing kit. Appellant left the store and returned with two boxes of pharmaceuticals. Mr. Grays informed appellant the boxes had the wrong packaging and appellant left the store without a refund.

On October 30, 2004, employee Debbie Shewfelt was contacted by a Russell Alexander at Camelot Drug Store. Mr. Alexander indicated his mother was not allowed to return a box of glucose strips and was treated very rudely by an employee. Mr. Alexander stated he would send his son to the store to handle the situation. Later that day, appellant entered the store and claimed to be the son of Russell Alexander. Appellant attempted to return a box of glucose strips for $246. Ms. Shewfelt was called away by Byron Grays, who told her he recognized appellant from the Drug Emporium. Ms. Shewfelt then told appellant the refund could not be completed without a receipt. Appellant left the store, stating he had

the receipt in his car. Ms. Shewfelt observed appellant get into a vehicle and drive away. She wrote down the license plate number and a check of records of the Department of Motor Vehicles indicated appellant's address matched the address for the vehicle's license plate number.

On May 20, 2005, appellant appeared with counsel before Judge Terri Schwartz for a jury trial. The prosecution was represented by Deborah Kass. The court indicated it had had a discussion with the parties and that it understood that earlier that day Judge Janice C. Croft had remanded appellant and set bail in the amount of $100,000. The matter was presently going to trial and the prosecution had offered a low term of two years on a plea to just one count. The maximum sentence was calculated at approximately six years.

Appellant responded he was "looking for . . . a misdemeanor." "[E]ither a misdemeanor or [an] opportunity to earn a misdemeanor -- or misdemeanors." The court explained if Judge Croft had just set bail in the amount of $100,000, it was not going to revisit that. It could not overrule what another judge had done, and appellant was going to remain in custody unless he posted $100,000 bail. The court stated, however, it wanted to try to settle the case, and if appellant wanted to plead to the court, the court would consider a sentence of 16 months. The court noted it did not see this case as warranting probation or a misdemeanor conviction.

After further discussions and agreement by appellant and no objection by the prosecution, the court stated, "So the agreement is you are going to enter pleas to all four counts; you are going to admit the one-year prior. The maximum punishment is six years in state prison. The court is indicating a sentence of 16

months. I am going to release you with an 1192 [*sic*] waiver.[2] [¶] You are going to agree that if you violate the law between now and your sentencing date or if you don't come back for sentencing, this will be an open plea; and you are going to consent to me giving you six years in state prison. [¶] Otherwise, when you do come back, I will give you 16 months. Or if your attorney can convince me to give you something better than that, I will be happy to listen. And I would like to get a report from a doctor to give me some additional information on the issue of sentencing." Appellant acknowledged that was his understanding of everything they had discussed. Appellant stated he was pleading no contest and admitting the prior freely and voluntarily because he believed it was in his best interest to take advantage of the court's offer.

Following appellant's plea, the court stated it was releasing appellant on his own recognizance and stated "I'm going to make this part of our deal that if you don't come back; if you violate the law, you are going to get the maximum and you're going to consent to that." Appellant acknowledged that was his understanding of the agreement and counsel joined.

---

[2] Penal Code section 1192.5 provides in relevant part, "If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea." "In *People v. Cruz* (1988) 44 Cal.3d 1247 . . . , [our Supreme Court] interpreted the provision of [Penal Code] section 1192.5 . . . [and held] that a defendant could expressly waive his or her rights under [Penal Code] section 1192.5 at the time the plea was entered. [Citation.]" (*People v. Masloski* (2001) 25 Cal.4th 1212, 1215, fn. 2.)

The court agreed to appoint an expert at defense counsel's request and to receive information from that expert for sentencing purposes. The court wanted to set the matter for probation and sentence setting in a few weeks so that appellant could advise the court regarding his surgery "because part of the agreement is that I'm going to let him take care of the surgery on his leg. I am not going to make any promises about the school thing, but we will take a look at it when you come back and we will deal with it later. But I am most concerned about him getting his surgery done as soon as possible. Okay?" Appellant agreed and July 7, 2005 was set as the date for "sentencing setting." The court noted if appellant had not had the surgery by then, it would continue the matter.

On the morning of May 25, 2005, appellant appeared in Judge Leslie E. Brown's court represented by counsel. The minute order reflects the matter was heard in that court for "Dept. NEE," Judge Schwartz's court. Appellant's motion to withdraw his plea was set for hearing on June 9, 2005, appellant was remanded and bail was set at $100,000. In the afternoon of that same date and in Judge Brown's court, cash bail was posted and appellant was released.

On June 3, 2005, the date for the motion to withdraw the plea was advanced and vacated and the motion was heard by Judge Schwartz.[3] Appellant stated he wished to withdraw his plea because he had not had sufficient time to think about it and had been on pain medication because of his leg. The court

---

[3] Judge Schwartz told appellant, "I asked that you come in today because there was an error made last time you were before the court in front of Judge Brown and you were taken into custody because you wanted to bring a motion to withdraw your plea. [¶] Technically, you should have been remanded no bail. And the court needed to make findings regarding the bail. My understanding is that the motion to withdraw the plea is presently set for June 9th; is that right?" "Why don't we hear it today. What is the reason you want to withdraw your plea?" Deputy District Attorney Kass was not present and Deputy District Attorney Steven Barshop was standing in for her.

responded appellant did not seem to have any lack of understanding of what was going on when he pled. Appellant acknowledged that he had changed his mind. Finding no good cause, the court denied appellant's motion to withdraw his plea. The court found that at the time of the plea, appellant knew what he was doing, understood the consequences, and thought about it. The court had given appellant time, let him speak to his mother[4] and had done everything to assist appellant in making a knowing and intelligent decision. The sentencing date remained July 7 and the court exonerated the bail that had been posted and released appellant on his own recognizance pending sentencing.

On that same date, the court advised that after speaking to Judge Croft, it was willing to discuss a sentence that was different from the one indicated originally, possibly a probationary sentence and time in custody. The court stated it would give appellant "an actual year and probation, which then will enable you to get a misdemeanor [after completing probation without any problem]." The court was offering to give appellant what he initially wanted, "which is an opportunity to get a misdemeanor out of this."

After appellant's mother addressed the court, the court explained it denied the motion to withdraw the plea and was offering appellant "a better offer today." Appellant would then be able to "take advantage of an expungement and a reduction" which he would not be able to do if he was sentenced to state prison.

After giving appellant an opportunity to speak to his mother, defense counsel requested that appellant be allowed to serve time on weekends. The prosecution stated it was not agreeing to anything, that it wanted appellant sentenced to prison.

---

[4] Appellant was 37 years old. He stated his mother knew "a lot more legal" and worked for the court.

The court then put the matter over to allow Ms. Kass to be present and stated it was "going along with Judge Croft's offer. So it may very well be just a plea to the court, which I think it was anyway. And I am changing my offer at this point in time. We will put it over a couple of weeks." The court stated it was "going to [give appellant] anywhere from 8 actual months to 365 actual days. I want to confer with Judge Croft on what she meant on that. And then whatever that is, if it's 8 months or 365, if you want to work something out where you can do a few days a week in county if they will allow you to do it, I will allow you to do it. So why don't you work on that also between now and July 7th." When the court asked appellant, "do we have a deal[,]" appellant responded they did. The court reiterated it needed "to confer with Judge Croft on what she had in mind." And that an evaluation by a psychologist would be helpful.

On July 7, 2005, appellant asked to have probation and sentencing continued. The psychologist had not been able to evaluate appellant because "Dr. Plotkin doesn't have an office, per se; and doesn't do out-of-custody interviews unless the interview is conducted in a public defender's office." Appellant was also having surgery on August 8.

The court explained, appellant was "going to do a year of actual time" and he could do it "however he wanted to do it. We agreed he could do weekends." Judge Croft had indicated an "actual year." The court stated appellant had better get the surgery taken care of because the court was going to take him into custody the next date.

On August 23, 2005, the court advised the parties it was not able to permit appellant to do weekends, "so . . . we are back to square one on this." Defense counsel stated appellant was requesting the court calendar a motion to withdraw his plea for thirty days; appellant had called his mother and they were ready to hire a private attorney and it would take her time to become familiar with the case

and file the motion. The court advised it would remand appellant with no bail until it was resolved. In response to appellant's request that he be allowed to post bail so he could assist his lawyer, the court stated, "At this point I'm not inclined to do that. And the record should reflect that originally we had a deal of 16 months and [the court] let [appellant] out of custody. Then [appellant] decided he wanted to bring a motion to set aside the plea. While that motion was pending, he bailed out. The court's intention was that if the motion to set aside the plea was going to be heard, that he be remanded no bail pending that motion. [¶] My recollection is we had [appellant] then, come in earlier on a date when Ms. Kass was not here and we renegotiated without Ms. Kass the disposition. In exchange the defendant did not bring -- my recollection is he did not bring his motion to withdraw his plea -- or if he did it was denied; I just don't have a recollection. [¶] But in any event, we agreed I thought -- although without the benefit of Ms. Kass; I think maybe Mr. Barshop was here and didn't really know anything about the case -- we agreed on the actual time. And when I say 'we,' I mean the court and Mr. Perkins. Because after speaking with Judge Croft I was told that she had offered that and I indicated I would go along with that. [¶] However, when we discussed the matter this morning, Ms. Kass -- who originally had this case -- is objecting to the court -- not so much the court doing the 365 actual, but the fact that the court proposed letting [appellant] do it on the weekends. And that would necessitate putting sentencing over for a significant period of time."

The prosecutor indicated "[t]hat would be about two and a half years" and she was not "comfortable with that." Her position had always been that this was a state prison case.

The court indicated further that while it did not believe there were sufficient grounds to warrant setting aside the plea, it was happy to hear it. Given

the history of the case, the court was of the opinion that appellant should be in custody.

Defense counsel modified the request and asked for a two-week date to file and litigate the motion. He argued "the deal has fallen through through no fault of [appellant.]" He requested appellant be allowed to remain out of custody on his own recognizance or be allowed to post bail; appellant was employed full time, was a student, and was one semester from getting his degree.

The prosecution objected, stating appellant had "pled in May and the court released him because he was supposed to have surgery and have a psychological evaluation. He has never done the psychological evaluation. Within two weeks he came in and attempted to post bail and withdraw his plea. And, you know, this set us on this road, but the original agreement was for low term."

The court then stated it was going to remand appellant and that it did not believe it had to set bail. Appellant had pled to the charges and admitted the prior and that bail was discretionary. The court acknowledged, "this latest twist is through no fault of [appellant, appellant] got out of custody initially because of the deal that he entered into. And I don't believe that there are valid grounds to set aside this plea." The court set a hearing date for the motion to set aside the plea.

On September 19, 2005, appellant filed a written motion to withdraw his plea, stating he had been "under duress and unable to assess and fully understand the significance of the decision he was asked to make." He filed a declaration under penalty of perjury wherein he stated from November 2004 to May 2005 he had remained out of custody on his own recognizance while his case was pending and had appeared at each of the scheduled court hearings. On May 20, 2005, when he appeared for trial, Judge Croft remanded him into custody with bail set at $100,000 and his case was transferred to Judge Schwartz. There they discussed

the possibility of a disposition and he understood if he pled guilty that day he would be released from custody. He was then left in the holding cell with only one and a half hours to consider the offer. He was suffering from varicose veins in his legs, which were causing him considerable discomfort. He had surgery scheduled to relieve the pain and knew if he remained in custody he could not have the surgery.

He further declared, "While I was considering whether or not to enter into a guilty plea, I could not fully appreciate, understand, or evaluate the impact of what was being proposed. I was very stressed by suddenly being taken into custody. My legs were causing me considerable discomfort. I also felt pressured by the short amount of time I had to consider the plea option. Due to these stressors, I could not make an informed and intelligent decision regarding the guilty plea. [¶] When I entered the plea, my head was spinning. I did not realize I had agreed to plead guilty to all four counts of second degree burglary. I also did not realize that I could receive a state prison sentence. I firmly believed that I would receive a county jail sentence based upon statements made at previous hearings before the Honorable Janice Croft. [¶] I was confused when the court explained the plea agreement to me. I told the court that I understood everything; however, I did not and should have asked questions. I felt as if I was in a Catch-22 situation and I knew I had to answer the questions in a certain way in order to avoid remaining in custody. [¶] After I was released from custody and I was no longer under the stress of confinement, I realized I made a mistake by entering into the plea agreement. I did not feel like I made an informed and intelligent decision due to stress of the situation. I telephoned my defense attorney the next day and informed him that I wanted to withdraw the guilty plea. At that time, my attorney told me that the judge would let me withdraw from the plea agreement.

[¶] I believe that I am not guilty of four counts of second degree burglary. I want to withdraw my guilty plea and take my case to trial."

On September 20, 2005, at the motion to withdraw the plea, appellant's counsel argued appellant "was under stress. He believed the only way he could get out of custody at that time was to enter a guilty plea. And immediately upon leaving the court he notified his defense counsel that he wanted to withdraw the plea. [¶] He does not believe that he was in -- could fully grasp the consequences of the plea agreement. And still wishes to go to trial on this case despite the fact that he could be facing a potential greater prison sentence should he go to trial and be convicted on all counts. [¶] He is so adamant that he wants to protect his rights to a fair trial that he is willing to face that risk because he believes he did not know what he was doing at the time of the plea."

In response, the prosecution argued that appellant had "a better appreciation than most people because he has already been to state prison . . .[and] was well aware of the fact that when he returned on May 20, if he didn't have the bond that he would be going into custody. [¶] So he had plenty of time to prepare. We had ongoing discussions for almost the entire 60-day period. So I don't think that [appellant] has a made a showing sufficient for the court to withdraw the plea."

The court attempted to recollect the proceedings and stated its recollection was that the day appellant entered his plea was the day he was remanded by Judge Croft, that part of the disposition contemplated immediate release. The deputy district attorney agreed. The court recalled that after appellant attempted to withdraw his plea, he and the court attempted on several occasions to renegotiate the bargain and appellant "stood by the disposition on both occasions." The court questioned the sincerity of appellant's claim of innocence since that was raised only after the prosecution refused to allow him to serve his sentence on

weekends. The court observed that appellant was using the motion to withdraw his plea as a negotiating tool and stated, "if this were simply a motion to withdraw the plea that was brought immediately after the disposition on the grounds that he felt coerced by his incarceration and that's what led him to enter the plea, I would grant the request. [¶] But since that time, we have had renegotiation on renegotiation. And it just seems to me that the defendant is attempting to once again renegotiate. And I don't believe his motion to withdraw his plea is meritorious. [¶] He seems to be using it as a tool to get a better deal. And for that reason I am going to deny the motion to withdraw the plea. The way I look at this is we had a deal for 16 months. Then I undercut my offer and went along with what Judge Croft indicated. And I think I'm back to where I said last time he can have the actual time in county. He could earn his misdemeanor, which is what he wanted up front. And that's the end of the road."

Thereafter, appellant stated "due to the conditions that he has been experiencing in county jail . . . he would prefer to do the 16 months in state prison than a straight year in county jail."

## DISCUSSION

Appellant contends the trial court erred in refusing to permit appellant to withdraw his plea. We disagree. Penal Code section 1018 provides in pertinent part, "On application of the defendant at any time before judgment . . . the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice."

"'"Good cause must be shown for such a withdrawal, based on clear and convincing evidence. [Citation.]" [Citations.] "To establish good cause, it must

be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.]" [Citation.] "The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty." [Citation.] [¶] '"When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. [Citations.] On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. [Citations.]" [Citation.] "Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." [Citation.]'" (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.) " However, '[a] plea may not be withdrawn simply because the defendant has changed his mind.' [Citations.]" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.)

The trial court's decision to refuse appellant's request to withdraw his plea was not an abuse of discretion. The trial court's findings that appellant knew what he was doing, understood the consequences of his plea and had ample time to think about his plea and talk to his mother are supported by the record. Further, as the prosecution noted, appellant was aware of the fact that on May 20 if he did not post bail he would be going into custody.[5] The trial court did all it could do to assist appellant in making a decision. Further, as the trial court observed, appellant admitted he had "changed his mind" and that was not a

---

[5] The minute order of the hearing on May 5, 2005, states "People's bail motion is heard and granted. Bail is set at $100,000. Defendant to post bail or surrender on 5/20/05."

sufficient reason to set aside a plea. (See *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

Further, contrary to appellant's claim, the original plea bargain was not breached. The bargained for terms were that appellant would enter a plea to all four counts and admit the one-year prior. In return he would be sentenced to prison for no more than 16 months. The court agreed to release appellant for a time before sentencing to allow him to have surgery on his leg and obtain a psychological evaluation and he waived the provisions of Penal Code section 1192.5, agreeing that if he violated the law before sentencing or did not come back for sentencing, he would be sentenced to six years in state prison. The fact that appellant was remanded by Judge Brown and in custody for half a day before posting bail did not deny appellant the benefit of his bargain. He was not prevented from having surgery or obtaining a psychological evaluation and there was never an indication by the court that it would not abide by the bargained for terms.

We additionally disagree with appellant's claim that the trial court's actions coerced appellant into accepting an agreement. On May 25, at the time of the plea bargain, the court's attempt to negotiate a bargain met with the approval of the prosecution and the court's involvement was appropriate. Thereafter, while the trial court attempted to accommodate appellant with a more beneficial resolution than the agreed to terms and may have taken an active involvement in attempting to please appellant, a second resolution never happened. Appellant was hopeful he could serve his sentence on weekends, but the trial court advised him that he could not. Any claimed prejudicial involvement by the court in the negotiating process is irrelevant in that the parties failed to come to any agreement. (See *People v. Orin* (1975) 13 Cal.3d 937, 943.)

While appellant now claims his plea agreement was breached by the inability of the court to sentence him to consecutive weekends in the county jail, that was never part of the original plea agreement. Moreover, having failed to raise this argument in the trial court, we need not consider it here.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.